United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-7354

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES O. FINLEY, SHIRLEY M. FINLEY, & CHARLES O. FINLEY & COMPANY, INC., Plaintiffs-Appellees -against- PARVIN/DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT, JESUP & LAMONT, JOHN J. DUNPHY & F.O.F. PROPRIETARY FUNDS, LIMITED, Defendants-Appellants.	:	No. 75-7354 APPEAL FROM AN ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ENTERED MAY 14, 1975 PURSUANT TO 28 U.S.C. § 1292(b)
PARVIN/DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT, JESUP & LAMONT, JOHN J. DUNPHY & F.O.F. PROPRIETARY FUNDS, LIMITED, Petitioners, -against- HONORABLE INZER B. WYATT, U.S.D.J., Respondent.	:	No. 75-3032 PETITION FOR EXTRAORDINARY WRIT PURSUANT TO 28 U.S.C. §1651 AND FED. R. APP. P. 21

BRIEF FOR DEFENDANTS-APPELLANTS AND PETITIONERS IN SUPPORT OF THEIR APPEAL AND THEIR PETITION FOR EXTRAORDINARY WRIT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES O. FINLEY, SHIRLEY M. FINLEY, & CHARLES O. FINLEY & COMPANY, INC.,	:	
Plaintiffs-Appellees,	:	No. 75-7354
-against-	:	APPEAL FROM AN ORDER OF THE DISTRICT COURT FOR THE SOUTHERN
PARVIN/DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT, JESUP & LAMONT, JOHN J. DUNPHY & F.O.F. PROPRIETARY FUNDS, LIMITED,	:	DISTRICT OF NEW YORK ENTERED MAY 14, 1975 PURSUANT TO 28 U.S.C. § 1292(b)
Defendants-Appellants.	:	
PARVIN/DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT, JESUP & LAMONT, JOHN J. DUNPHY & F.O.F. PROPRIETARY FUNDS, LIMITED,	:	No. 75-3032
Petitioners,	:	PETITION FOR EXTRAORDINARY WRIT
-against-	:	PURSUANT TO 28 U.S.C. §1651 AND FED. R. APP. P. 21
HONORABLE INZER B. WYATT, U.S.D.J.,	:	
Respondent.	:	

BRIEF FOR DEFENDANTS-APPELLANTS AND PETITIONERS IN SUPPORT OF THEIR APPEAL AND THEIR PETITION FOR EXTRAORDINARY WRIT

Introduction

On May 2, 1975 the United States District Court for the Southern District of New York by Honorable Inzer B. Wyatt denied petitioners-appellants' joint motion to dismiss the complaint herein for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure.* (A-156)**

On May 13, 1975 Judge Wyatt amended his order to include the requisite certification under 28 U.S.C. §1292(b) that the decision involved a controlling question of law as to which an immediate appeal might materially advance the ultimate termination of the litigation. (A-157).

On May 27, 1975 defendants petitioned this Court for leave to appeal Judge Wyatt's order of May 13, 1975 or, in the alternative, for a writ of mandamus directing Judge Wyatt to vacate that order and to enter an order dismissing the complaint for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure.

By Order dated June 16, 1975 this Court granted

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* Rule 41(b) provides in part: "Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

** References preceded by "A" are to pages of petitioners'-appellants' Appendix.

leave to appeal under 28 U.S.C. §1292(b) and referred the petition for a writ of mandamus to the panel hearing that appeal.

Issue Presented

The issue presented here is best stated by the question certified by the District Court:

> "Where the District Court concluded that an action should otherwise be dismissed for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, is the District Court precluded as a matter of fairness from dismissing because the Individual Assignment and Calendar Rules adopted by the District Court in July. 1975 do not provide any machinery by which a plaintiff can give notice that the plaintiff is ready for trial and is asking for a trial?"

The certified question - and the transcript of the hearing before Judge Wyatt on May 2, 1975 (A-111)- make clear that Judge Wyatt has ruled that the institution of the Individual Assignment System in mid-1972 by the Southern District of New York has precluded Judges in that District from dismissing any action for failure to prosecute under Rule 41(b). Specifically, Judge Wyatt held that the adoption of the Individual Assignment System without the inclusion of a specific calendar rule allowing the filing of a note of issue - or some similar device - made it unfair to dismiss this case despite five years of virtually complete inactivity, irrespective of any presumed prejudice to defendants due to plaintiffs' prolonged failure to prosecute, or the showing of <u>actual</u> prejudice to defendants and in the face of plaintiffs' failure to offer a credible excuse for

their lack of activity. Indeed, the Court below held that at present there is no state of facts which permits a Rule 41(b) dismissal for lack of prosecution in the Southern District. (A-116, 123).

Hence, the ruling below goes far beyond a failure to properly exercise discretion in this case. The ruling constitutes an abrogation of Rule 41(b) where plaintiffs have failed to prosecute in the Southern District, a proposition conceded by Judge Wyatt (A-116, 123). As such, the scope and practical effect of the order below is no different than a holding that the Court is without power to act. Thus, if unreversed, the Southern District of New York, alone among Federal Courts, will no longer be able to dismiss a case which plaintiff has failed to prosecute.

Even if the decision below is viewed more narrowly, i.e., as the exercise of discretion limited to this case only, reversal or mandamus is appropriate, since failure to dismiss here would constitute a clear abuse of discretion.

STATEMENT OF FACTS

This action was commenced in the District Court for the Northern District of Illinois on April 8, 1970 by the filing of a complaint alleging violations of Sections 5 and 12 of the Securities Act of 1933 and Section 9 and 10(b) of the Securities Exchange Act of 1934 in connection with plaintiffs' purchases,

in March and April, 1969, of 37,000 shares of the common stock of Parvin/Dohrmann Company, Inc. (A-11). Plaintiffs sought recission or damages in excess of $2,500,000, but as will be explained below, the present damage claim is now approximately $300,000. Plaintiffs purchased 30,000 shares in a private placement from defendant F.O.F. Proprietary Funds, Limited. The remaining 7,000 shares were open market purchases.

Plaintiffs are Charles O. Finley, his wife, and a family corporation. Defendants in the Court below are Parvin/Dohrmann Company, Inc. ("Parvin Dohrmann"), acquired by Argent Corporation ("Argent") in a successful cash tender offer in 1974; Messrs. Coleman and Scott, Chairman and President of Parvin Dohrmann respectively during the relevant period in 1969; F.O.F. Proprietary Funds, Limited ("FOF"), one of the IOS Funds now under the control of its parent's liquidator in the Supreme Court of Ontario, Canada; Jesup & Lamont, a registered broker-dealer which assisted FOF in the private placement which included shares sold to plaintiffs, and Mr. Dunphy, a former partner in Jesup & Lamont.

On August 25, 1970, the Illinois District Court, pursuant to defendants' prompt appearance and motion under 28 U.S.C. §1404(a), ordered the transfer of this action to the Southern District of New York. More than one year passed before plaintiffs' counsel appeared by notice dated September 30, 1971.

The long delayed notice of appearance was accompanied (on October 4, 1971) by a notice to produce to three of the defendants (Parvin Dohrmann, Coleman and Scott), and a notice to take their depositions.

The document demand was not pursued; instead those defendants made an informal production of material, principally transcripts of SEC testimony. The deposition notices were adjourned a number of times, and in early 1972, abandoned. Depositions of FOF, Jesup and Lamont and Dunphy were never noticed, nor were any document demands ever made upon those defendants.* (A-76).

Since then there has been no prosecution of the action, nor any visible activity that would prepare plaintiffs to try this complex case or which would indicate an intention to conduct such a trial. Thus there have been no interrogatories, no attempt to obtain additional documents or to pursue leads in the documents produced.

Subsequent to plaintiffs' abandonment of the depositions, scheduled in 1971, well-publicized actions both by the Securities and Exchange Commission and by private litigants, alleging many of the same facts as the complaint here, were disposed of.** Indeed, these plaintiffs received 833 shares of Parvin Dohrmann stock valued at $29,779.75 in a 1972 settlement of the action brought by the SEC. None of the defendants hereto was

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* The absence of discovery as to FOF is significant since FOF did not testify in and was not a party to the SEC action or the related civil action, and thus renders suspect the assertion that plaintiffs are prepared because their attorneys have copies of the deposition transcripts in those actions.

** FOF was not a party to those SEC and private actions and the allegations here against it were not included in those complaints.

required to contribute or did contribute to that settlement. (A76, 77).

More important, neither the SEC settlement, nor the widely publicized settlement of the class action based on the SEC suit, nor a subsequent settlement of a private action (described in reports to shareholders, including plaintiffs) stimulated plaintiffs to revive this case, which is based in part on similar claims. In fact, those settlements did not even move plaintiffs to do so much as call defendants to find out if their claims might also be settled. (A-77).

Although plaintiffs point to the fact that they "opted out" of the class action in August, 1972 as evidence of their "diligent prosecution" (see Answer to Petition, p. 12),* the very opposite conclusion is warranted, for despite plaintiffs' decision to opt out of the class, they still did absolutely nothing to pursue their claims for the next three years.

Indeed, since plaintiffs opted out of the class action there have been two substitutions of counsel for defendants. In December, 1973 and January, 1974, respectively, FOF and Parvin Dohrman served notices advising that they had retained new counsel. Neither notice brought any response from plaintiffs. There was no indication of any kind to those new counsel (any more than to those who

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* The letter announcing the decision to opt out, was sent only to the Clerk of the District Court. Copies were not sent either to counsel in this case or in the class action. Moreover, FOF was not a party to the class action and there is no showing that FOF or its counsel was aware of this fact.

remained in the case) that plaintiffs intended to prosecute and bring this action to trial. (A-77).

In December, 1973, the Company notified all its shareholders, including plaintiffs, of an exchange offer whereby the Company's common stock could be exchanged for debentures. This prompted no action or response by plaintiffs or their counsel. (A-77).

Plaintiffs' lack of interest in this action is further illustrated by events in January 1974 when FOF's present counsel was substituted following the assumption by the liquidator of control of FOF. In a letter dated January 22, 1974 FOF's counsel suggested that this case be consolidated with a related action. Although a copy of that letter was sent to counsel for plaintiffs in this case, plaintiffs neither responded thereto nor took any action whatsoever. (A-95).

In April, 1974, an agreement was announced whereby Argent would purchase by way of tender all shares of Parvin Dohrmann stock (including those still held by plaintiffs). A tender offer was made to all stockholders and the merger of the Company into Argent was completed on August 31, 1974. Once more, plaintiffs gave no indication to defendants that they had any interest in pursuing this action. Rather, plaintiffs tendered their shares pursuant to the Argent offer

and they received $88 per share.* Thus the damage claim in this action shrunk from $2,500,000 to $300,000, and the claim for rescission became moot.** (A-72, 77, 78).

After completion of the tender offer in August, 1974, the case continued to remain absolutely dormant until it was reassigned to Judge Wyatt under a program designed to expedite the disposition of actions pending in the Southern District for more than three years. At that time the case was called for review by Judge Wyatt.

Plaintiffs' only activity in this case following the conceded long dormancy (A-62, 148) was to authorize their attorneys to appear at the pretrial hearing called by the District Court on April 3, 1975 in an attempt to clear its calendar. But even that manifestation of interest in the case (if it can be called that) was extraordinarily limited. Thus, despite having been advised by Magistrate Schreiber that Judge Wyatt had ordered this case to trial within a few weeks of the April 3 conference, Mr. Finley did not deem it important enough to communicate with his counsel. In fact, because of Mr. Finley's lack of interest, his counsel did not know on

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* The actual price was $44 per share but the stock had split 2-for-1 between plaintiffs' purchases and the tender offer.

** Plaintiffs, at a pretrial conference on April 18, 1975, stated that their damage claim was approximately $300,000. In the Answer to the Petition, the figure has been pumped up to $1,000,000. The air in the revised claim apparently consists of the amount of interest paid by plaintiffs on money borrowed to purchase the stock in question. Plaintiffs would be hard put to cite authority for such a proposition, especially where the length of the period in which interest was accumulating is due to plaintiffs' lack of prosecution.

April 3, or even at the pre-trial conference on April 18, whether plaintiffs had tendered their shares pursuant to the Argent offer. (A-78). It defies comprehension for plaintiffs' counsel to take the position they now take when a few weeks before the scheduled trial they were unable to find out from their own client whether they had a $2,500,000 claim or the $300,000 claim they now assert.

Defendants' motion to dismiss followed the review conference ordered by Judge Wyatt on April 3. The motion was based upon the presumed prejudice which, under the law, arises from a substantial delay such as the five years involved here. Messenger v. United States, 231 F.2d 328, 331 (2d Cir. 1956). That legal presumption was buttressed below by affidavits demonstrating the actual prejudice suffered by all defendants. (A-72-95). Thus, it was shown that in addition to the fading of memories that necessarily occurred in the six years which have passed since the acts upon which this complaint is based took place, important witnesses have become unavailable.

For example, in the five years since this action was commenced, the individual who served as house counsel for defendant Parvin Dorhmann left its employ. The same is true of the individuals who served as financial officer and the one who served as secretary to the company. All are beyond the subpoena power of the District

Court and will not voluntarily testify. (A-80).

Undoubtedly, other witnesses are now unavailable, but the most dramatic development in this regard is the position in which defendant FOF finds itself. Defendant FOF is a wholly-owned subsidiary of The Fund of Funds, Limited, both Canadian corporations which were "off-shore" mutual funds. After the difficulties experienced by The Fund of Funds, as a result of its falling into the hands of Robert L. Vesco, the Supreme Court of Ontario, on August 1, 1973, appointed a liquidator for The Fund of Funds, Limited and the liquidator has thereafter become the president of defendant FOF. As a result, all of the former management and employees of The Fund of Funds, Limited and defendant FOF are no longer connected in any way with either. Thus, the passage of time has deprived FOF of the ability to call any officer, director or employee who might have any knowledge with respect to the allegations in the complaint of events which transpired in 1969. Indeed, one officer who had crucial knowledge of relevant events, Edward M. Cowett, who was in his mid-40's, died unexpectedly in 1974. (A-81, 93-95, 125-127).

FOF was the entity which sold plaintiffs the 30,000 shares in a private placement in issue here. The late Mr. Cowett was the one who made the decision to make that sale. (A-126). (The complaint alleges that sale violated the securities laws and seeks

recision or damages against all defendants.) Also in issue are the circumstances surrounding FOF's purchase of the shares in question. Thus, the unavailability of FOF's witnesses, including Mr. Cowett prejudices the defense of all defendants.*

Judge Wyatt did not take issue with any of the foregoing. Indeed, he unequivocally found that on the facts this case should be dismissed for lack of prosecution. This finding is embodied in the certified question (p. 3, supra) as well as in Judge Wyatt's remarks during the course of the hearing. (See e.g. A-123, 132-133, 147-148).

The Court also held that plaintiffs' proferred excuses for the long delay did not alter his view that this was a case which should properly be dismissed for failure to prosecute. (A-150).

Indeed, the Court made it clear that the only reason defendants' motion was denied was because there is no explicit, formal procedure by which plaintiff is required to place his case on the trial calendar.

> "The only reason--and I have made it, I think, abundantly clear--the only reason that I don't dismiss the action for failure to prosecute is that I see no machinery under our present system for getting a case tried if you are the plaintiff, outside of writing letters and telephoning the judge." (A-147).

This was not a reason advanced by plaintiffs who never suggested

* Plaintiffs' Answer to the Petition tried to show that Mr. Cowett was not involved in FOF's decisions to buy and sell the Parvin Dohrmann shares. This effort was based on a gross misrepresentation of the record in another proceeding as fully detailed in FOF's Reply submitted to this Court.

they were ready but unable to obtain a trial.

The Court made it equally clear that it believed that not only this motion but all motions for failure to prosecute must now be denied.* The record shows:

> "MR. BARNES: ... Otherwise, your Honor is saying that we are writing Rule 41(b) off the books in this Circuit.
>
> "THE COURT: In effect, that is exactly what the present system has done." (A-116).

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* The Court could not logically have held otherwise, for it is difficult to conceive of a case with more compelling facts in support of dismissal than this one. Indeed, if Judge Wyatt were waiting for an opportunity to test his views as to the catastrophic consequences of the Individual Assignment System, under circumstances which, if affirmed, would undoubtedly govern all other cases, it is no wonder he seized upon this case.

POINT I

REVERSAL OF THE COURT BELOW IS REQUIRED

The holding below embodied two findings (A-157):

(1) On the record before it - including plaintiffs' proffered "explanation" for the long delay - this case should be dismissed under Rule 41(b).

(2) Because of the institution of the Individual Calendar Assignment system the District Court was precluded "as a matter of fairness" from dismissing because the Individual Calendar Assignment Rules do not provide any machinery by which a plaintiff can give notice that he is ready for trial and is asking for trial.

Since the key question raised is the one posed by the second branch of the holding we turn to that first.

The Court Below Erred in Holding That the Individual Calendar Assignment System Precluded Dismissal Here.

There are at least eight reasons why the District Court's failure to dismiss is erroneous.

(1) Although Judge Wyatt found this case should be dismissed, he believed he could not do so because under the Individual Assignment System there was no way in which the plaintiffs could make known their readiness for trial. Further he believed this provided an absolute excuse for failure to prosecute a case that predated the adoption of that system by two and one-half years.

These beliefs are the essence of the error below. First, Judge Wyatt was wrong in concluding that no mechanism exists whereby a plaintiff in the Southern District of New York can give notice to the Court and defendants that he is ready for trial. If plaintiffs had felt the need to utilize some formal procedure or "machinery" to get their case to trial (although it is difficult to understand why) they could have turned to Rule 15 of the Civil Rules for the Southern and Eastern Districts of New York which explicitly provides that, in the absence of a procedural rule in those districts, recourse may be had to procedures available in New York State Courts. Since Rule 3402 N.Y. Civil Practice Law and Rules provides for a Note of Issue, plaintiffs could have, justifiably, filed a Note of Issue had they desired to. If Judge Wyatt is correct that the motion below turned on the ability of plaintiffs to avail themselves of a formal mechanism, such as a note of issue, such a mechanism exists. Hence, the motion to dismiss should have been granted.

More important, it was not necessary for plaintiffs to have adopted the state practice. They could simply have written to the Judge to whom the case was assigned, signifying their

readiness for trial. There is no showing that the Judges to whom this case was previously assigned would not have permitted such a procedure.*

Judge Wyatt may have misread the local rules which existed prior to the Individual Assignment System. (A-115). Those rules provided for a note of issue but did not place plaintiff under an obligation to file such a note. Hence, plaintiffs were in essentially the same position in regard to manifesting their readiness for trial after the advent of the Individual Calendar Assignment system as before. Indeed, the note of issue provision was undoubtedly dropped at the time the new system was adopted, not to alter plaintiffs' obligations or to shift the onus for moving a case forward from the plaintiff to the Court, but because it is now easier for plaintiff to manifest a readiness for trial (i.e., by a letter or phone call to the assigned judge). Under the former system plaintiffs had no particular judge to contact, hence a more formal procedure, the note of issue, was necessary.

Judge Wyatt, therefore, was wrong in believing that it was any less "fair" to dismiss after the system changed than before.

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* Indeed, an informal poll of the Chambers of all of the other District Judges in the Southern District (including those Judges to whom this case had earlier been assigned) conducted by Appellants discloses that a telephone call to Chambers or a letter to the Judge typically results at least in a pre-trial conference to consider a trial date.

(2) The misconception as to the obligations under the old as opposed to the new system appears to have led to another error. It apparently was Judge Wyatt's view that plaintiffs' failure to do anything to move this case along is not enough; that the Court must find that plaintiffs failed to abide by a rule which placed them under an affirmative duty to do something before it could grant a motion to dismiss for failure to prosecute.* (A-115, 116). That view manifests a misreading of Rule 41(b).** That is, the District Court seemed to confuse two of the three distinct grounds for dismissal prescribed in Rule 41(b). That Rule provides that "For failure of the plaintiff

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* Plaintiffs take the same view. They say dismissals are still possible "if plaintiffs fail to obey an order" citing cases of the disobedience of court rules or orders. This only confirms that the first Rule 41(b) ground - failure to prosecute - is off the books if the District Court is affirmed.

** Although the Court's remarks are somewhat confusing, there is some basis for believing it may have fallen into this error: "You have to notice a case for trial, and if you did not notice a case for trial or file a note of issue, then that was a default, an omission, and you could understandably move to dismiss for failure to file a note of issue. But under what I regard as a stupid and a vicious system, as I have said many times from this bench but which I am powerless to do anything to prevent, under the present system plaintiff does not have to file any note of issue, and what I am concerned about is what could this plaintiff have done since the present system was in effect to get a trial?" (A-115, 116).

to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action . . ." (Emphasis supplied). Listing these grounds in the disjunctive implies, as a matter of statutory construction, that each is a separate and distinct ground for dismissal. Cf., Greater Iowa Corp. v. McLendon, 378 F.2d 783, 796 (8th Cir. 1967). Judge Wyatt's rationale, by focusing on the absence of a "default" by plaintiffs, must have been thinking only of the third ground for dismissal. Under this ground, a default (i.e., failure to comply with an order) would be a prerequisite to dismissal. No such prerequisite is required for a dismissal under the first ground - a failure to prosecute.

(3) We come now to the most significant flaw in Judge Wyatt's holding that the absence in the Southern District of an explicit provision for a note of issue or similar device constitutes the reason -- and provides an absolute excuse -- for the failure to prosecute. At no time did the plaintiffs ever entertain the belief that they were stymied by the lack of such provision. Indeed, in the affidavit filed by plaintiffs' attorney in opposition to the motion below, there is not even a suggestion that the reason this case has been so long dormant is the absence of a device by which they could announce their readiness for trial. (A-96-110). That affidavit scrapes hard for excuses and comes up with a "breakdown of communications", "other [more] pressing matters" and finally ill health. But

nowhere does it suggest the excuse on which Judge Wyatt based his decision. There, even if some theoretical justification can be found for Judge Wyatt's view that the system is somehow at fault, none exists for applying that view here.

(4) There is another important reason why, even if the Court below was right in theory, the motion below should not have been denied. The history of the companion cases makes it abundantly clear that the fault here was not with the system - but with plaintiffs and their own view of the merits of their case.

The SEC action arising out of facts alleged here was echoed not only by the inevitable class action, but by two cases brought by individual investors: this action and 20th Century Fund v. Jesup & Lamont, et al. (commenced in the Southern District in June, 1970).

The class action was no more and no less vigorously prosecuted than others of its ilk. Yet plaintiffs in that action were able to terminate their case by way of settlement in December, 1972.*

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* In approving the settlement of the class action, Judge Metzner, after review of the merits of the claims, characterized the settlement as a "windfall" to the "so-called injured shareholders." This is no reason to allow plaintiffs here the opportunity to coerce a similar windfall.

The 20th Century case probably cannot be called a model of vigorous prosecution. Yet that case was brought to the eve of trial in February 1974* notwithstanding the advent of the Individual Calendar Assignment system and the absence of an explicit provision for giving notice that a case is ready for trial.

Hence, the fault here does not lie in the system, it lies in plaintiffs' deliberate decision not to prosecute this action.

(5) The error in failure to dismiss is emphasized by defendant FOF's letter of January 22, 1974. That letter, sent by new counsel for FOF to the Court with a copy to plaintiffs' counsel, suggested that this case be consolidated with another related case which was then moving toward trial. Plaintiffs did not even respond to that letter. (A-95). That failure to respond confirmed what counsel in this case had long before concluded: that plaintiffs had no interest in moving this case to trial.**

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* At that time plaintiffs accepted what defendants regarded as a cost-of-litigation settlement offer.

**Had defendants' counsel, including FOF's new counsel, not been lulled by plaintiffs' failure to respond into believing the case was abandoned, it would have had the opportunity (among other things) to depose Mr. Cowett who was still alive at that time.

We believe plaintiffs still have no genuine interest in a trial and that it is fair to infer that their opposition below is not a rekindled desire to prosecute, but an attempt to give this matter a quantum of nuisance value in the hope defendants, faced with the prospect of a trial without the presence of key witnesses, will be coerced into a settlement.

(6) Judge Wyatt apparently also believed that the institution of the new calendar system freed the District Court from the rulings of this Court such as Tradeways Inc. v. Chrysler Corp., 342 F. 2d 350 (2d Cir.), cert. denied, 382 U.S. 832 (1965); and Messenger v. U.S., 231 F.2d 328 (2d Cir. 1956), which require dismissal under the circumstances here (passage of significant period of time, unavailability of witnesses). (A-126, 127). Again, he was mistaken. The rule of those cases has been applied by this Court since the Individual Assignment system came into being. Jos. Muller Corp. Zur. v. S.A. DeGerance, 508 F.2d 814 (2d Cir. 1974). In that case this Court sustained a dismissal for non-prosecution consisting of plaintiff's failure, during a four year period, to effect service of process upon four named defendants, notwithstanding that customarily it is the United States Marshal, and not the plaintiff himself, who effects physical service of process. Even more fundamentally, in affirming the dismissal for non-prosecution, this Court explicitly relied upon Messenger v. United States, supra, which was one of the four cases cited by

this Court in Tradeways Inc. v. Chrysler Corp., supra, and stated that "Messenger is the governing law and the judgments are therefore affirmed." 508 F.2d at 815.

(7) The order below is also in direct conflict with the case whose facts most closely resemble those here.

In S & K Airport Drive-In, Inc. v. Paramount Film Dist. Corp., 58 F.R.D. 4 (E.D. Pa.), aff'd without opinion, 491 F.2d 751 (3d Cir. 1973), an antitrust action, the court dismissed the complaint for lack of prosecution under Rule 41(b), despite the fact that the court operated under a system similar to the Individual Calendar Assignment system. The case had been dormant for a period of approximately seven years until it was uncovered through the efforts of one of the District Judges who undertook to clean up old cases pending in the district.* When the case

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* A situation not unlike the institution of the crash program in the Southern District to dispose of old cases.

was called for a pretrial conference, defendant moved to dismiss for failure to prosecute.

While plaintiff's counsel in the early stages of the litigation initiated discovery, that discovery was, as here, abandoned. The court noted that defendants' counsel had concluded from this fact that plaintiff intended to permit the case to remain dormant. The court held that defendants' counsel was reasonably entitled to make that assumption and that he could not be faulted for not pursuing his own discovery.

> "Plaintiff argues that had defendant's counsel vigorously pursued discovery, the testimony of all of these witnesses would have been preserved for trial. True enough, but plaintiff's inaction reasonably misled Stanley's counsel to conclude that plaintiff did not really intend to pursue this action against Stanley, consequently Stanley's counsel was justified in not incurring the very considerable expense (estimated at from $50,000 to $100,000) involved in completing discovery. (N.T. 14)" id. at p. 8.

Nor did the Court accept plaintiff's contention that defendants were in pari delicto insofar as there had been a lack of activity in the case.

> "I cannot agree that it is the defendant's duty to urge plaintiff and his counsel to move quickly to trial. 'The responsibility is squarely up to the plaintiff and his attorney.' Bendix Aviation Corp. v. Glass, 32 F.R.D. 375 (E.D. Pa. 1962), aff'd per curiam, 314 F.2d 944 (3rd Cir. 1963). As the late Judge Kirkpatrick stated in Tinerman Products, Inc. v. George K. Garrett Co., Inc., 22 F.R.D. 56, 57 (E.D. Pa. 1958):

> 'I see no reason why the party who was sued . . . should take any steps to subject himself to the expense and inconvenience of a trial if the plaintiff's neglect is such as to give the defendant the hope or expectation that the case will never be tried.'" id. at p. 7.

In considering the rights of defendants and other litigants, the Court observed:

> "As the Court of Appeals for the Ninth Circuit observed in Von Poppenheim v. Portland Boxing and Wrestling Comm., 442 F.2d 1047, 1054 (9th Cir. 1971):
>
> 'Somewhere along the line, the rights of the defendants to be free from costly and harassing litigation must be considered. So too must the time and energies of our courts and the rights of would-be litigants awaiting their turns to have other matters resolved." id at p. 8.

Although the Court adopted the general rule that prejudice to defendants is presumed, it noted that the passage of time had created actual prejudice to defendants, because, as here, many of the witnesses were no longer in the defendant's employ or had died. Id at p. 8.

Finally the Court held, contrary to Judge Wyatt's holding below, that the fact that there was no automatic or predetermined mechanism for getting to trial did not excuse plaintiff's failure to prosecute.

> "Plaintiff has also pointed an accusing finger at the court suggesting that 'the fact that this case was never previously listed for trial must be considered by the Court as grounds for not dismissing.' I reject the notion that the court's failure to list a case for trial constitutes an excuse for plaintiff's failure to prosecute. Courts have taken a more active role recently to control their calendars and to avoid unnecessary delay, but this increasing activist role on the part of the courts is neither reason nor excuse for an abdication of counsel's obligation to move his client's cause along." id. at p. 7 (citations omitted).

We submit this decision in the Third Circuit is correct. The institution of the Individual Assignment and Calendar Rules and the crash program, cannot convert a case (which was started years before either of those devices) from one which is properly dismissable to one which is not.*

(8) On the record here there is no issue as to whether plaintiffs have failed to prosecute within the meaning of Rule 41(b). Judge Wyatt has so found, and the case law confirms that finding. (See Point II, infra.) There is no issue as to whether plaintiffs have offered -- or should be allowed to offer -- an explanation of their gross failure. The Court below has found they have no satisfactory explanation, and the Court should not even consider such an explanation under the circumstances here.

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* Judge Wyatt's contrary feeling was prompted, perhaps, by his antagonism to the crash program and the Individual Assignment system. (A-115, 118, 120).

Thus, if the order below is not reversed, defendants will be forced to trial only because the case is pending in the Southern District; that is, only because Judge Wyatt views the local procedures of that District as abrogating Rule 41(b). Such a result is not only unwarranted; it is, in our view, unconstitutional. See Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019, 1013 (2d Cir. 1973).

POINT II

THE FINDING THAT DISMISSAL WAS WARRANTED WAS CORRECT

In order to prevail here plaintiffs must show either that Judge Wyatt was right in his view that the advent of the Individual Assignment system provided an absolute excuse for pre-existing as well as continuing failure to prosecute;or that he was in error in finding that on the facts here, this case warranted dismissal under Rule 41(b).

To upset the latter finding would require plaintiffs, in our view, to demonstrate that Judge Wyatt clearly abused his discretion in finding that the failure to prosecute here warranted dismissal. But, whether plaintiffs actually have the burden is not material. On the facts and under the applicable cases, Judge Wyatt was clearly correct in holding that Rule 41(b) required dismissal. Indeed, a contrary finding would have been a clear abuse of discretion.

The Facts Compel a Finding That Dismissal Was Warranted

(1) There is no excuse for the gross failure to prosecute.

We have detailed in the Statement of Facts, supra,

the history of plaintiffs' inactivity in this action. Thus, we have shown: (1) For a full year after the case was transferred to New York plaintiffs did not even retain New York counsel. (2) That the totality of the activity during the five year history of this case consisted of notices to produce documents to three of the six defendants (Parvin Dohrman, Coleman and Scott) and notices to depose these defendants. The notices to depose were abandoned after a number of adjournments, and the document demand was dropped when those defendants made an informal production of SEC and AMEX transcripts and exhibits even though the demand called for far more than those documents. (3) No interrogatories have ever been served on any party; no attempt to depose, or otherwise discover facts from, the other three defendants in this action has ever been made; no discovery in regard to any on-party witness has ever been attempted. (4) Plaintiffs did not respond or show any sign of life when they received or were served with various papers including notices of substitution of counsel. (5) Plaintiffs failed to respond to a letter requesting that this case be consolidated with a similar action. (6) Finally, plaintiffs not only showed no interest in prosecution, they manifested no interest in initiating settlement talks -- even in the face of well-publicized settlements of similar actions.

The attempt to "explain" this inexcusable behavior

is found in Paragraphs 10-15 of the Shelton affidavit submitted in opposition to the motion below. (A-99-103).

The first explanation proffered, (one which the affidavit urged should be given "much weight"), is that this case had been transferred from Chicago to New York. (A-99-100). The suggestion is that New York is an inconvenient forum and therefore, the failure to prosecute should be excused. The fact is that the transfer to New York expedited the only "discovery" which took place in this case, the informal production of the SEC and AMEX documents which were located at the New York offices of Parvin Dohrmann's counsel. In any event, the weight deserved by this contention (if any) is no greater than that given it by the District Court.

The Shelton affidavit next attempts to explan the abandonment of the notices to depose Coleman, Scott and Parvin Dohrmann by the assertion that "we thought that depositions might not be necessary in light of this [SEC and American Stock Exchange] prior testimony" (emphasis added), followed by the allegation that "either Mr. Daniels or Mr. Barnes of the Townley, Updike firm agreed with this approach."* (A-101). Neither Mr. Daniels, Mr. Barnes, nor anyone else at Townley,

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*This allegation is based on what Mr. Shelton was told by Mr. Carroll whose memory is apparently hazy at this point. We can well understand how, over the intervening 3 1/4 years Mr. Carroll's memory has not only grown dim but become confused. We cannot understand, however, how Mr. Shelton, confronted with Mr. Carroll's vague memory after approximately 3 years, can brush aside (as he did below) the problems created for defendants by forcing them to rely on witnesses who will be called upon to recall events that occurred more than 6 years ago, if the case goes to trial.

Updike agreed to any approach which would have allowed the SEC testimony (which lacked cross examination) or the American Stock Exchange testimony (which lacked not only cross examination but the presence of counsel) to be substituted for depositions. There is no stipulation so stating -- and no such foolhardy agreement was ever made.

Indeed, not only did Townley, Updike not agree that depositions were unnecessary, Mr. Shelton's firm apparently does not agree. Upon being informed of defendants' intention to move to dismiss, notices to depose and document demands identical to those abandoned over three years before were immediately served by plaintiffs' counsel.

No explanation is found in the affidavit concerning the failure to attempt any discovery at all in regard to the three other defendants.

The Court below was next asked to excuse plaintiffs' failure because of an alleged "breakdown in communications between Mr. Finley [who makes his home and has his office in Chicago] and Chicago counsel", which, according to the affidavit, prevented Chicago counsel from relaying a communication from New York counsel to Mr. Finley for a period of approximately three years. (A-101).

Since we hestitate to attack a sworn statement of opposing counsel, we are left with little to say except:

(1) If we are to credit this assertion at all, then we are entitled to question the plaintiffs' suggestion that this case would have been vigorously prosecuted if only it had not been transferred, and had been left in the hands of Chicago counsel; and

(2) Can there be any doubt that Judge Wyatt was correct in refusing to accept the purported communications breakdown as an excuse for failure to prosecute?

Finally, the Court below was asked to accept as an excuse the "recent health problems" of Mr. Finley. (A-101, 102). Mr. Shelton tells of Mr. Finley's heart attack in August 1973 (two and a half years after the single spasm of activity in the case transpired), and then attempts to lead the Court to the conclusion that Mr. Finley's heart condition was responsible for the failure to prosecute (including the failure of his counsel to take the depositions or demand the documents which were noticed on the eve of trial) for a period of approximately one year, the time during which, according to the Shelton affidavit, paragraph 14 (A-101, 102), Mr. Finley was on a "very limited schedule".

Putting aside for a moment the fact that the foregoing in no way explains the lack of activity during the two and a half years before -- or the eight months after -- the one year period of illness, it appears that Mr. Shelton has

been too quick to accept his client's representations.

Thus, Mr. Shelton's suggestion that Mr. Finley's condition was responsible for the inactivity in this case is belied by the fact that four months after his heart attack Mr. Finley commenced a suit in Federal District Court in San Francisco seeking to prevent Dick Williams, then the manager of Mr. Finley's baseball team, from joining the New York Yankess.*

In any event, whether or not Mr. Finley's activities were somewhat curtailed from August 1973 to August 1974 and are still to some extent "restricted" (Shelton affidavit ¶14, A-101, 102), Judge Wyatt cannot be faulted for refusing to accept that as an excuse for the five year failure to prosecute.

Moreover, with all due respect for counsel's sensibilities, and for the optimism that must spring eternal even in damaged hearts -- one would have thought the news of Mr. Finley's condition would have occasioned some minimal activity in the case (namely, an attempt to preserve Mr. Finley's testimony for the benefit of his co-plaintiffs, his wife and a family corporation), rather than providing an alleged excuse for continued inactivity.

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*In addition, press reports covering the World Series in October 1973 demonstrate that far from being recumbent from a recent heart attack, he was in the Oakland "A's" dressing room taking a hyperactive role in running the team.

Lest the Court think our skepticism as to the health excuse is unjustified, let us point out that Mr. Shelton apparently shares our doubts about its validity. Immediately after the statements giving the impression that Mr. Finley's incapacity was the reason for the lack of activity in this case, Mr. Shelton reverses field and puts forth the suggestion that the failure to prosecute may have been due to Mr. Finley's "wide-ranging business activities", and to "the other pressing matters which Mr. Finley had to deal with on a day to day basis". (A-102).

Undoubtedly, Mr. Finley had other fish to fry, but those efforts provide no excuse for his decision to foresake the prosecution of this matter.

In the course of Mr. Shelton's explanation, he alludes to a letter to the Clerk of the District Court in which Mr. Finley exercised his option not to participate in the settlement of the class action (a copy of that letter is attached to the Shelton affidavit). Mr. Shelton offers this as evidence that Mr. Finley had not abandoned his claims. (A-102). We have the following comments:

1. The relevant facts here are those concerning action taken to prosecute this suit -- not those relating to

Mr. Finley's intentions. Those intentions are irrelevant if they resulted in no visible action to move the case to trial.

2. The letter in question (A-109) indicates it was not sent to counsel in this suit or, for that matter, to counsel in the class action. If Mr. Finley meant this to be an announcement of his intention to pursue this litigation, it would seem, at a minimum, he should have sent such copies.

3. The letter was drafted and sent in the midst of the great communications breakdown. It seems a pity that plaintiffs and their counsel did not seize the opportunity during the brief moment when communications were miraculously restored to do something to actively move the case along.

Plaintiffs' explanations are not only contrived, inconsistent and in large part incredible -- they are incomplete. The Shelton affidavit does not even address itself to such matters as the failure to react to notices of appearance or to the request for consolidation. Hence, Judge Wyatt cannot be faulted for refusing to find that the failure to prosecute was excusable.

(2) The existence of actual prejudice has not been refuted.

Apparently aware that even if plaintiffs succeed in establishing excusable neglect, the existence of actual

prejudice would nonetheless compel dismissal,* the Shelton affidavit attempts to deal with that issue as well. (¶¶16-24, A-103-108).

Although defendants were entitled on their motion below to rely on the presumed prejudice which, under the law, arises from a delay as substantial as the one here, ** affidavits were filed showing actual prejudice arising not simply from faded memories and corporate changes but from the complete unavailability of witnesses. (A-72-95).

Thus it was shown that key employees of Parvin Dohrmann, its house counsel, corporate secretary and the financial officer, are no longer so employed. (A-80) Mr. Shelton's response (¶21, A-105) is his conjecture that "... it would appear that all witnesses who Mr. Barnes claims are unavailable to Parvin Dohrmann have been unavailable for approximately the last five years."*** That is not so. House counsel, the first to leave, departed in the fall of 1971, approximately a year and a half after this suit was commenced. The corporate secretary left toward the end of 1974, and the

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* Messenger v. United States, 231 F.2d 328 (2d Cir. 1956).

** Id.

*** That conjecture is based entirely on the assertion that, "according to information available to me, there was a complete change in management at that time. [5 years ago]" Mr. Shelton did not give the source of his information, but once again he has been too ready to accept what he has been told.

financial officer departed near the beginning of 1972. All of these witnesses are outside the jurisdiction and would not be available to testify at trial (A-80).* The affidavits below also pointed out that other witnesses were undoubtedly also unavailable.

Most striking, it was also shown that a key witness, Edward M. Cowett, died of an unexpected heart attack a little over a year ago. (A-94, 126) Mr. Cowett made the decision to sell FOF's Parvin Dohrmann stock to Mr. Finley (the sale which forms the basis of the Section 5 charge) and had knowledge of the circumstances of the earlier Coleman sale of those shares to FOF (a transaction involved in the manipulation and false filings charges). (A-126). The Complaint charges all defendants in Count I with liability for the Section 5 violation. It also charges all defendants, other than FOF, with manipulation. Thus all defendants are prejudiced by Mr. Cowett's recent death.

Mr. Shelton's affidavit made no attempt to deal with Mr. Cowett's death. However, in plaintiffs' Answer to Defendants' Petition to this Court (at pp. 16-18), plaintiffs contended that the passing of Mr. Cowett did not deprive defendants

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* Indeed, after the merger of Parvin Dohrmann into Argent Corporation in late 1974, it is questionable whether the Company is able to produce ary witness in its defense. This corporate change in identity with its concomitant change in personnel was well-known to plaintiffs by their participation in the mid-1974 tender offer.

of a witness who "could have given testimony valuable"* to defendant. Plaintiffs argued that Mr. Cowett's testimony was unimportant because "for the purpose of determining whether there was a violation of §5 the circumstances surrounding the purchase of the unregistered stock as well as the circumstances leading up to its sale - not the actual sale - are the crucial facts." In addition, plaintiffs purport to rely on interrogatory answers filed in another case and to testimony before the SEC to support the contention that Mr. Cowett did not have relevant testimony as to these issues.

In its Reply to this Court, FOF established:

(1) The key issues in regard to the Section 5 charge was whether the stock was purchased with the requisite investment intent and whether the FOF sale to Finley (and others) was occasioned by unanticipated changed circumstances and thus was not evidence that a distribution was originally contemplated.

(2) Plaintiffs had mischaracterized the testimony and interrogatory answers on which they purported to rely. For example, plaintiffs stated that "Mr. Cowett may have been somewhat involved in the decision to sell the Parvin Dohrmann stock." (Answer ¶¶16, 17). The actual testimony, however, shows that, "the decision [to sell] was really being made by

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* Tradeways Incorporated v. Chrysler Corporation, 342 F.2d 350, 352 (2d Cir. 1965).

Ed Cowett" (FOF Reply, p.4).

(3) Thus it was clear that Mr. Cowett could give testimony bearing directly on the Section 5 issue. (As pointed out above, Mr. Cowett also "could have given testimony valuable" to defendants on questions which relate to the manipulation and false filing charges.)

Neither in the record below, or in the subsequent papers, have plaintiffs produced an adequate answer to the demonstration that actual prejudice exists not only because of the unavailability of Parvin Dohrmann personnel, but also because of Mr. Cowett's death.

(3) The contention regarding the merits of the case.

Plaintiffs' answer to the petition also chides defendants for failing to include in that petition the ritualistic avowal that this case is without merit. We apologize for breaking with tradition, but we did so because:

(a) The merit, or lack thereof, of this action is not in issue - and, of course, cannot be determined - on a motion to dismiss.* Thus plaintiffs' attempt to turn a Rule 41 motion into an inquiry into the merits, or to impose a new burden under that Rule upon defendants, is groundless.

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* No case has held that a showing of lack of merit is a prerequisite to dismissal under Rule 41(b) or that inquiry into the merits is necessary or appropriate.

(b) We do not believe that it was any more proper for defendants to assert that this case lacked merit than it is for plaintiffs to assail the Court with claims that their case is meritorious.

But to avoid any misinterpretation of our silence on the issue, we set beside the plaintiffs' unsupported conclusitory allegations as to merit, the following facts:

(1) Plaintiffs failed to bring this case to trial for over five years. The Court is entitled to view that fact as a more reliable indicia of the merits than the belated and unsupported protestations stimulated by the motion to dismiss.

(2) The SEC action which preceded this case contained a claim for "disgorgement of profits" and, in fact, certain of the defendants in the SEC action were not allowed to settle that action without such disgorgement.* None of the defendants here, however, were required by the SEC to make any payment in order to obtain a settlement of the SEC action.

(3) Judge Metzner, who approved of the settlement of the class action, had access to the same SEC testimony and documents on which plaintiffs rely as well as the briefs

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* The plaintiffs along with all other Parvin Dohrmann shareholders participated in the distribution of the profits obtained by the SEC settlement.

of all parties when he concluded:

> "After reading the papers submitted in connection with the proposed settlement and hearing counsel on oral argument, it appears to me that the stockholders are getting quite a windfall. Counsel for plaintiffs state that the road to ultimate success after trial is extremely difficult, but nevertheless they have really caused defendants to pay more than they should in settlement. Defendants state that they want to buy their peace because this lawsuit is hindering contemplated future action, and that they want to avoid the expense and inconvenience of burdensome litigation. I approve the settlement on behalf of the so-called injured stockholders."

The Applicable Authorities Require Dismissal

Rule 41(b) of the Federal Rules of Civil Procedure provides that a defendant may move for dismissal of an action if the plaintiff has failed to prosecute. The obvious intention of this rule is to safeguard against delay in litigation and harassment of a defendant. Barger v. Baltimore & O.R. Co., 130 F. 2d 401 (D.C. Cir. 1942). Indeed, it is well established that federal courts have the inherent power sua sponte to dismiss for lack of prosecution. Link v. Wabash R. Co., 370 U.S. 623 (1962)

A plaintiff's usual right to a hearing on its claim must be carefully weighed against presumed and actual impairment of defenses by unreasonable delay, the wholesome policy of law in favor of prompt disposition of law suits, and the duty of plaintiffs to proceed with due diligence. States Steamship Company v. Philippine Airlines, 426 F.2d 803, 805 (9th Cir. 1970).

This action has been pending for more than five years and has remained totally stagnant since the termination of the informal document production in January, 1972. There is little question that the case would have continued in the same dormant posture had it not been for the Court's program to expedite the disposition of cases pending three or more years. Now that plaintiffs have been stirred to some activity by the actions of this Court and by the motion below, their past inactivity and neglect cannot be ignored. Hicks v. Bekins Moving & Storage Co., 115 F. 2d 406, 409 (9th Cir. 1940).

The well established rule in this Circuit, as elsewhere, is that prejudice to defendant will be presumed from a substantial delay in prosecution. See Messenger v. United States, 231 F.2d 328, 331 (2d Cir. 1956) where the Court held:

> "the operative condition of the Rule [41(b)] is lack of due diligence on the part of the plaintiff - not a showing by defendant that it will be prejudiced by denial of its motion."

But where actual prejudice has been shown, this Court in Messenger held that it:

> "may be considered by the court, especially in cases of moderate or excusable neglect, in the formulation of its discretionary ruling."

As was fully documented in the affidavits submitted to Judge Wyatt, plaintiffs' delay of over five years in prosecuting this action created real prejudice beyond that presumed by law. Indispensable witnesses to defendants' defense of the case are no longer employed by or associated with defendants. They cannot be compelled to appear on behalf of defendants. Some are hostile, some beyond the subpoena power of this Court, and at least one crucial witness has died in the interim.

A similar danger was expressly recognized by this Court in Tradeways Incorporated v. Chrysler Corporation, 342 F.2d 350 (2d Cir.), cert. denied, 382 U.S. 832 (1965) where the Court dismissed a complaint after trial on the ground there had been a failure to prosecute to defendant's acute disadvantage.

There, as here, the death of one of defendant's witnesses was an important factor compelling dismissal:

> "In our opinion, it was an abuse of discretion for Judge Ryan not to grant this motion. The delays appear to be almost entirely the fault of Tradeways . . . . The delay eventually worked to the prejudice of Chrysler, owing to the unexpected death in an airplane accident in May 1962, three and a half years after the start of this litigation, of Welch, Chrysler's Director of Promotions Programming, who directed Chrysler's performance of the written contract which its answer admitted making, and who could have given testimony valuable to Chrysler." Id. at 352.

In addition, see our discussion at pages 22 to 25, supra, of S & K Airport Drive-In, Inc. v. Paramount Film Dist. Corp., 58 F.R.D. 4 (E.D. Pa.), aff'd without opinion, 491 F.2d 751 (3d Cir. 1973). The holding and rationale of that case on the one hand support Judge Wyatt's correct finding that this case should "otherwise" be dismissed under Rule 41(b), and on the other, demonstrates the error of his conclusion that he was precluded from dismissing because of the Individual Calendar Assignment system.

Whether defendants rely on the presumption of prejudice or the prejudice actually existing in this case, the words of the Ninth Circuit are applicable here:

> "Somewhere along the line, the rights of the defendants to be free from costly and harassing litigation must be considered. So too must the time and energies of our courts and the rights of would-be litigants awaiting their turns to have other

> matters resolved. The exact point on that line is incapable of exact definition, but we are satisfied that the present case went beyond it." Von Poppenheim v. Portland Boxing and Wrestling Comm., 442 F.2d 1047, 1054 (9th Cir. 1971), cert. denied, 404 U.S. 1039, rehearing denied, 405 U.S. 999 (1972).

Plaintiffs' failure, with the exception of the informal document exchange, to initiate any activity in pursuit of their cause for a period of over five years is unreasonable and inexcusable. Neglect of this magnitude has never found justification in the reported decisions. Hicks v. Bekins Moving & Storage Co., 115 F.2d 406, 409 (9th Cir. 1940). See also, Messenger v. United States, 231 F.2d 328, 331 (2d Cir. 1956) (where this Court stated that it would have been a gross abuse of discretion to find excusable neglect when there had been a complete lack of any prosecutory effort for six years).

The authorities indicate that cases, less compelling than this one, are appropriate for dismissal. Cases which have been dormant for less than five years have been readily dismissed. SEC v. Power Resources Corp., 495 F.2d 297 (10th Cir. 1974) (three year delay from filing of a complaint until preliminary injunction hearing); Holtenback v. California Western Railroad, 465 F.2d 122 (9th Cir. 1972), (dormant four years after filing of a complaint, except for some discovery 2 1/2 years before dismissal); Maxey v. Citizens National Bank of Lubock, Texas, 459 F.2d 56 (5th Cir. 1972) (dormant four years after filing of a complaint); Spering v. Texas Butadiene & Chemical Corporation, 434 F.2d 677 (3d Cir.

1970), cert. denied, 404 U.S. 854 (1971) (dormant four years after filing of a complaint, except for some discovery three years before dismissal); Salmon v. City of Stuart, Fla., 194 F.2d 1004 (5th Cir. 1952) (dormant 1 1/4 years after filing of a complaint).

Plaintiffs cannot assert at this late date that they had legitimately contemplated prosecution. This is not a case where plaintiff voluntarily picked up its burden to prosecute after a period of dormancy but rather it is the classic instance where a plaintiff has been stirred to action only by the imminent threat of dismissal. Despite the document requests and disposition notices served by plaintiff after the April 3, 1975 pretrial conference and after being notified by defendants that this motion would be made, this last minute activity cannot obscure, excuse or rectify the past neglect:*

> ". . .an order of dismissal may be granted, notwithstanding the plaintiff has been stirred into action by the impending dismissal, for subsequent diligence is no excuse for past negligence." Hicks v. Bekins Moving & Storage Co., 115 F.2d 406, 409 (9th Cir. 1940).

The Hicks court succinctly stated the rule applicable here:

> "'The duty rests upon the plaintiff at every stage of the proceeding to use diligence and to expedite his case to a final determination, and unless it is made to appear that there has

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* Plaintiffs' lack of good faith in their eleventh hour flurry of discovery activity is further evidenced by the fact that

> been a gross abuse of discretion on the part of the trial court in dismissing an action for lack of prosecution its decision will not be disturbed on appeal.' Inderbitzen v. Lane Hospital, supra (17 Cal. App. 2d 103, 61 P. 2d 516)"

It, of course, was not necessary for defendants to show that plaintiffs actively and affirmatively took steps to obstruct the progress of the action, Bendix Aviation Corporation v. Glass, 32 F.R.D. 375, 377 (E.D. Pa. 1962), affirmed, 314 F.2d 944 (3d Cir.), cert. denied, 375 U.S. 817 (1963). Rather, as stated in Bendix:

> "It is quite sufficient if he [plaintiff] does nothing, knowing that until something is done there will be no trial."

Judge Wyatt found that plaintiffs offered no satisfactory explanation for their complete inactivity here. Nor is there any excuse or explanation other than a choice not to pursue their remedy in this forum. Where there has been inexcusable neglect by virtue of an unreasonable delay in addition to a showing of actual prejudice, we submit there can be no alternative but dismissal under Rule 41(b).

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the voluminous document requests in April of this year are identical to the document requests served, but abandoned, three and one-half years earlier, including the same typographical errors. It is obvious from the appearance and format of these requests that the 1975 notices had been quickly run off at the last minute on the same magnetic cards or tapes that had been used three and one-half years earlier.

The facts and law, as set forth above, mandate a reversal of Judge Wyatt's decision on appeal. Alternatively, they require the issuance of a writ of mandamus to Judge Wyatt directing him to dismiss this action for failure to prosecute.

POINT III

A WRIT OF MANDAMUS SHOULD ISSUE

This Court has the power under 28 U.S.C. §1651 (and Rule 21 of the Federal Rules of Appellate Procedure) to "issue all writs necessary or appropriate in aid of" its jurisdiction. A writ of mandamus is appropriate here both under the more traditional standards and under what has come to be called "supervisory mandamus" to compel the District Court to exercise its lawful power (Judge Wyatt having felt, in effect, powerless to dismiss because of the Individual Assignment system) and to promote orderly administration of justice within this Circuit.

The Traditional Standards

The writ of mandamus is traditionally available to correct decisions of lower courts when they exceed their power, refuse to exercise judicial power or commit a clear abuse of discretion, DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945), United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966), Grace Lines, Inc. v. Motley, 439 F.2d 1028, 1031 (2d Cir. 1971).

In International Business Machines Corp. v. United States, 471 F.2d 507 (2d Cir. 1972), cert. denied, 416 U.S. 980 (1974), relying on American Express Warehousing Ltd. v. Transamerica Ins. Co., 380 F.2d 277 (2d Cir. 1967), set forth the traditional touchstones for review by mandamus:

> (1) usurpation of power by the district court; or

(2) clear abuse of discretion by the district court; or

(3) presence of an issue of first impression.

This case meets all three criteria.

First, the abrogation of a Federal Rule in the Southern District with no justification other than dissatisfaction with or misconception of local practice, is clearly an usurpation of power by the District Court. Judge Wyatt's "repeal" of Rule 41(b) could well be viewed as even greater usurpation of power than the orders which resulted in the issuance of mandamus directed to Judge Edelstein who had ordered the disclosure of privileged documents in the IBM case, supra, and to Judge Motley who declared a mistrial and ordered an immediate retrial, precluding defendant's use of Rule 50(b), Fed. R. Civ. P. Grace Lines Inc. v. Motley, 439 F.2d 1028, 1030 (2d Cir. 1971). Judge Wyatt's belief that the Individual Assignment system precludes dismissals for failure to prosecute under Rule 41(b) abrogated that Rule and prevented defendants from invoking the sanctions of that Rule. The decision not to dismiss below was not an exercise of Judge Wyatt's discretion. In his discretion, he concluded the case should be dismissed. Nevertheless, he found himself powerless to enter an order consistent with that finding.

At best, Judge Wyatt's reliance on the Individual Assignment system to defeat dismissal constitutes the improper use of that factor in reaching his decision. That too is grounds for mandamus. Cf. A. Olinick & Sons v. Dempster Brothers, Inc., 365 F. 2d 439, 443 (2d Cir. 1966).

This Court, in United States v. Nebbia, 357

F.2d 303 (2d Cir. 1966), has held that mandamus is available to compel the exercise of discretion. There, Judge Sugarman released a defendant on bail believing he was powerless to do otherwise. Concluding that Judge Sugarman was free to exercise his discretion on the issue of bail, the Court stated:

> "Mandamus has long been recognized to be available to compel a judge or officer to exercise discretion which he had erroneously considered himself to lack. Work v. United States ex rel. Rives, 267 U.S. 175, 184, 45 S. Ct. 252, 69 L.Ed. 561 (1925)." Id. at 305.

Second, the circumstances here (detailed above) establish that even if there is some merit in Judge Wyatt's views, he abused his discretion in refusing to dismiss this case. See Tradeways Incorporated v. Chrysler Corporation, 342 F.2d 350, 352 (2d Cir.), cert. denied, 382 U.S. 832 (1965); Messenger v. United States, 231 F.2d 328, 331 (2d Cir. 1956).

Third, the issue here, as expressed in the certified question, appears to be one of first impression, and thus supervisory mandamus is required. Schlagenhauf v. Holder, 379 U.S. 104, 110-111 (1964); United States v. Lasker, 481 F.2d 229 (2d Cir. 1973), cert. denied, 415 U.S. 975 (1974); International Business Machines Corp. v. United States, supra. No court, so far as we are aware, has made a similar ruling. Indeed, neither in their papers in the District Court nor in their Answer to the Petition to this Court have plaintiffs proposed or espoused as their justification, theory or explanation for the years of inactivity the "theory" articulated by Judge

Wyatt, namely that the Individual Assignment system provided no mechanism for noticing readiness for trial and thereby denied plaintiffs access to a trial. This is an extraordinary case. Because of the rationale underlying the District Court's decision, this is not the usual case involving common factors normally considered in deciding a motion to dismiss for failure to prosecute.

Supervisory Mandamus

The Supreme Court has made it clear that Courts of Appeals have the power to issue writs of mandamus in support of their supervisory authority over the district courts of the circuit. Schlagenhauf v. Holder, 379 U.S. 104 (1964); LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

> "We believe that supervisory control of the District Courts by the Courts of Appeal is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus ..." Id. at 260.

Accord: United States v. Lasker, 481 F.2d 229 (2d Cir. 1973); see also: Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595 (1973).

Where, as here, (a) the District Court has misinterpreted or misapplied local rules (the Individual Calendar Assignment Rules) to abrogate Federal Rule 41(b); (b) the error is on a wholesale level likely to affect other judges in the Circuit; and (c) the issue is a novel one--one of first impression--and on which other district judges need and are entitled to guidance, this Court can and should prescribe its "supervisory power" over the administration of justice in

this Circuit. This case is peculiarly appropriate for the exercise of that power since it deals directly with the District Court's ability to control its own calendar and with the right of defendants within the District to have available to them the full composite of the Federal Rules of Civil Procedure, a right presumably available to defendants in all other Districts.

Plaintiffs assert in their Answer to the Petition to this Court that it is not enough to pose novel and important issues to justify the issuance of mandamus. Rather, plaintiffs urge, the challenged order must raise a classical mandamus "power" question. This case does that. But even if it did not, plaintiffs' outdated view has been abandoned.

> "... we do not believe that the propriety of mandamus depends on whether the asserted error is labelled as an exercise of non-existent power or merely as an abuse of discretion. The important considerations, in the final analysis, are the gravity of the issue involved and the necessity that the reviewing judges see for corrective action." United States v. Lasker, supra at 235.

The decision below poses a grave issue requiring corrective action. Supervisory mandamus is to be issued when some broad policy or basic jurisprudential tenet has been threatened by the lower court action, which threat has a potentially wide impact on the proper administration of justice. See Will v. United States, 389 U.S. 90 (1967), and cases cited therein.

Action comparable to that taken by the District Court here prompted this Court to issue a writ of mandamus in United States v. Lasker, supra.

The issue in Lasker--whether Judge Lasker's interpretation of the Criminal Prompt Disposition Rules did violence to the policies sought to be promoted thereby--parallels the issue here, namely, whether Judge Wyatt's view of the impact of the Individual Assignment and Calendar Rules on Rule 41(b) does violence to the philosophy of prompt disposition of civil actions, the goal of both the Federal Rules and the local rules. Rule 83 of the Federal Rules of Civil Procedure authorizes local practice rules if not inconsistent with the Federal Rules. Judge Wyatt's interpretation makes the local rules not only inconsistent with but superior to the Federal Rules. Therefore, mandamus is appropriate here to effectuate this Court's supervisory power to determine the proper interpretation of the interaction between local calendar rules and the Federal Rules of Civil Procedure.

A Writ of Mandamus is also essential to prevent an unnecessary and protracted trial of a complex securities fraud action - time more properly devoted by the District Court to plaintiffs who have actively pursued their claim and who have not abandoned their right to a prompt disposition. If the District Court's order of May 2, 1975, as amended by its order dated May 13, 1975, is allowed to stand, the fact pattern of the Tradeways case, supra, will be repeated. There, this Court was required after trial to reverse

plaintiffs' verdict on the ground that Judge Ryan abused his discretion in not dismissing for failure to prosecute. Thus, the issuance of a Writ of Mandamus at this time will best serve the interests of proper judicial administration.

CONCLUSION

By reason of the foregoing, defendants respectfully ask this Court to reverse the District Court's decision and direct the entry of an order dismissing the complaint herein for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure; or, in the alternative, to issue a Writ of Mandamus to the Honorable Inzer B. Wyatt, United States District Judge for the Southern District of New York, directing him to dismiss the complaint herein for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure; and for such other relief and to this Court may seem just and proper.

Dated: New York, New York
June 27, 1975

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